No. 22,650

In the

United States Court of Appeals

For the Ninth Circuit

A & A Sign Co., Inc.,

Appellant,

vs.

Rex E. Maughan, Trustee, Successor to Walter P. Fuller, Trustee,

Appellee.

Appeal from the United States District Court for the District of Arizona

Brief for Appellee

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STATUTES

TEXTS

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This matter arises from proceedings for corporate reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501-676. All jurisdictional facts were established in the District Court by the debtor's amended petition (R. 9-16)[1], which the District Court found to be in compliance with the requirements of Chapter X and approved.

1. The record in this case consists of a volume of court filings plus a transcript of various hearings. The court filings are numbered consecutively so that an item on page 100 will be cited "R. 100".

This Appeal is from the Findings of Fact, Conclusions of Law and Order concerning the validity and priority of secured claims of creditors entered by the District Court on October 20, 1967, and October 24, 1967 (R. 282-314). This Court has jurisdiction under 11 U.S.C. § 47.

STATEMENT OF FACTS

On July 15, 1965, the debtor, Mayer Central Building Corporation, filed a petition under Chapter X of the Bankruptcy Act (R. 1-8). On July 19, 1965, the District Court approved the petition and appointed Walter E. Fulford Trustee (R. 18). On November 24, 1965, the District Court entered its order approving the petition as amended (R. 18-21).

On September 5, 1965, the appellant, A & A Sign Co., Inc., filed its notice and claim of lien whereby it claimed a materialman's lien against real property and improvements situated in Phoenix, Arizona upon which it alleged it furnished labor and material for the debtor.

On February 18, 1966, the Trustee filed a petition seeking an order directing the Mayer Development Company, a partnership consisting of Eric D. and Lawrence D. Mayer, to assign and turn over to the debtor, the buyer's interest in an agreement to purchase land (hereinafter called the "Ann Clark property") (R. 24-31).[2]

The District Court referred the Trustee's petition to Vincent D. Maggiore, Referee and Special Master. On March 21, 1966, the master submitted his report to the District Court (R. 32).[3] In his report, the master found that

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2. A copy of this agreement appears at R. 29-31; appellant refers to the agreement as "Appellant's Exhibit No. 3" in its Opening Brief.

3. The appellant refers to the report as "Appellant's Exhibit No. 4" in its Opening Brief.

Lawrence D. and Eric D. Mayer, doing business as Mayer Development Company, a co-partnership, entered into an agreement to purchase the Ann Clark property. The master found that the debtor had made all the payments on the Ann Clark contract when the Mayers were its principal stockholders and managing officers. In his Conclusions of Law, the master stated that "the debtor corporation has both the legal and equitable right and title to the buyer's interest in said agreement." (R. 36). The master proposed an order requiring the Mayers as Mayer Development Company to execute and record a deed and assignment of all their right, title and interest in the agreement[4] (R. 37).

On April 2, 1966, the Mayers by a vendee's deed conveyed the Mayer Development Company's interest in the Ann Clark property to the Trustee. On May 9, 1966, the Court approved the Trustee's acquisition of the vendee's interest (R. 284).

On August 22, 1966, the District Court entered its order setting the time for hearing pursuant to Sections 196 and 197 of the Bankruptcy Act (R. 61), and those hearings were held in the fall of 1966.[5]

On February 10, 1967, appellant and the Trustee entered into a stipulation which in substance provided that the parties thereto agreed that the appellant had a valid materialman's lien against the property described in the

4. Although the proposed order did not specify in whose favor the deed and assignment was to be executed, appellee concedes that it was to be in favor of the debtor.

5. On July 21, 1966, the Trustee filed his petition for an order setting a time for summary hearings of objections to claims pursuant to §§ 196 and 197 of the Bankruptcy Act (R. 58). A list of the claims to which the Trustee objected, with a brief statement of the reason for such objection, was attached to that petition as an exhibit. The Trustee listed a claim by A & A Sign Co., Inc. in the amount of $21,493.28. In his explanation, the Trustee classified that claim as unsecured because of late lien filing (R. 60).

stipulation (R. 194-196). On February 20, 1967, pursuant to the stipulation, the District Court entered its order approving the stipulation (R. 196-198).

Subsequently, the Trustee filed a motion to correct the stipulation and the District Court's order dated February 20, 1967, by deleting the Ann Clark property from the land subject to that order. The basis of the Trustee's motion was that the Ann Clark property had been included in the stipulation and consequently in the order through mistake and inadvertence (R. 256-263). Appellant opposed this motion (R. 246-255). On October 9, 1967, the District Court heard the Trustee's motion.[6] The District Court took the motion under advisement after appellant submitted evidence with respect to its understanding of the stipulation.

Subsequently, appellant moved to admit as part of the Section 197 proceedings, the argument, testimony and evidence presented at the October 9th hearing (R. 275-279). The basis of that motion was that when appellant entered into the stipulation in February, 1967, it believed it unnecessary to present further testimony as to the validity of its lien, but upon objection to the stipulation, it believed it necessary to include the testimony as part of the Section 197 hearings previously held (T. 44). On October 20, 1967, at the continued hearing on appellant's motion to admit as part of the Section 197 hearings, the parties elicited further testimony from appellant's representative as to the validity of its lien.

On October 20, 1967, the District Court entered its Findings of Fact and Conclusions of Law.[7] The Court found that on April 2, 1966, by vendee's deed, the Trustee acquired the contract interest of Mayer Development Company to the

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6. The record contains a transcript of hearings held on October 9, 18 and 20, 1967. That transcript will be referred to as "T".

7. The District Court's Findings of Fact and Conclusions of Law which appellee deems material are set forth in Appendix A.

Ann Clark property and prior to April 2, 1966, the debtor had no interest in the Ann Clark property. The District Court further found that appellant had a contractual relationship with the debtor wherein appellant agreed to and did construct certain signs for the debtor on two properties called the "North" and "South" properties.[8] The District Court found that this work was performed pursuant to the contract from November 5, 1964 to July 2, 1965 and appellant recorded a Notice and Claim of Mechanics' Lien on September 23, 1965 claiming a lien against both the "North" and "South" property and against the Ann Clark property.

In its Conclusions of Law, the District Court held that valid mechanics' and materialmen's liens attached only upon the lot upon which were situated the structures on which the claimant performed labor and/or furnished materials (R. 303). The Court further held that appellant's lien, to the extent valid, attached only to the debtor's interest in the "North" property which had theretofore been determined to be valueless and even if valid, the lien exceeded the value of its security in the amounts claimed and thus its claim should be reclassified as unsecured in its entirety. The District Court further concluded that the Trustees were the owners of the vendee's interest in the Ann Clark property subject to no lien or encumbrance by any party to the proceedings (R. 306).

On October 24, 1967, the District Court entered its order wherein it held that the estate of the debtor corporation was the owner of the Ann Clark property and any funds generated from the sale of that property were to be free of all liens or encumbrances by any party to the proceedings (R. 313).

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8. The District Court viewed the debtor's property as constituting three distinct parcels: the "North" property, the "South" property and the "Ann Clark" property (R. 283-284).

SUMMARY OF ARGUMENT

1. The District Court properly held that the Ann Clark property and proceeds from its sale were not subject to appellant's lien because the debtor had no interest in that property which was subject to the lien.

A. The Mayer Development Company did not hold the vendee's interest in the Ann Clark property as a constructive trustee because a constructive trust is created only by court decree and no such decree was made by the court.

B. Assuming arguendo that a constructive trust was established, the debtor corporation did not have an interest in the Ann Clark property which was subject to appellant's lien.

2. The District Court properly held that the Ann Clark property was not subject to any liens or encumbrances because appellant failed to perfect its lien and failed to prove that it had provided the labor and materials upon which its claim of lien was based.

A. Appellant did not substantially comply with the statutory requirements to perfect its lien.

B. Appellant did not prove that it furnished the labor and materials upon which its claim of lien was based.

3. The District Court properly relieved the trustee from the stipulation and the Court's order based upon that stipulation pursuant to Rule 60(b), Federal Rules of Civil Procedure on the grounds of mistake, inadvertence and excusable neglect on the part of the trustee.

A. The District Court properly relieved the trustee of the stipulation which he had entered into as a result of mistake, inadvertence, or excusable neglect.

B. The District Court properly relieved the trustee from its order pursuant to Rule 60(b) Federal Rules of Civil Procedure.

C. The appellant waived its right to rely on the stipulation by electing to attempt to prove its lien.

I. The District Court Properly Held That the Ann Clark Property and Proceeds from Its Sale Were Not Subject to Appellant's Lien Because the Debtor Had No Interest in That Property Which Was Subject to the Lien.

A. INTRODUCTION.

On April 2, 1966, Mayer Development Company, a partnership, executed a vendee's deed to the Ann Clark property in favor of the debtor. The District Court found that prior to April 2, 1966, the debtor had no interest in the Ann Clark property. If the debtor had no interest in the Ann Clark property when the appellant performed its work, then there is no interest to which appellant's lien or claim of lien could attach. We do not understand the appellant to contend otherwise. Instead, the appellant contends that the debtor had a vendee's interest in the Ann Clark property at the time appellant allegedly performed the work upon which its claim of lien is based. The appellant's contention is based upon two propositions: (1) the original vendee, Mayer Development Company, held the vendee's interest as a constructive trustee for the debtor; and (2) because the Mayer Development Company held the vendee's interest as a constructive trustee for the debtor, the debtor's vendee's interest in the property relates back to October 1, 1963, the date of the agreement for the sale of the property between Ann Clark and the Mayer Development Company.

Contrary to appellant's contentions, no constructive trust was created or existed and even if a constructive trust did exist the debtor's vendee's interest does not relate back

prior to April 2, 1966 and was not subject to a materialman's lien. Accordingly, at the time appellant performed its work and filed its claim of lien the debtor had no interest to which appellant's lien could attach.

B. THE MAYER DEVELOPMENT COMPANY DID NOT HOLD THE VENDEE'S INTEREST IN THE ANN CLARK PROPERTY AS A CONSTRUCTIVE TRUSTEE BECAUSE A CONSTRUCTIVE TRUST IS CREATED ONLY BY COURT DECREE AND NO SUCH DECREE WAS MADE BY THE COURT.

A court decree expressly establishing a constructive trust is essential to its existence. *International Refugee Organization v. Maryland Drydock Co.,* 179 F.2d 284, 287 (4th Cir. 1950); *Papazian v. American Steel & Wire Co. of New Jersey,* 155 F.Supp. 111 (N.D. Ohio 1957). "A constructive trust, as distinguished from an express or preexisting trust, is one requiring the declaration of a court of equity." *Memphis Memorial Park v. McCann,* 133 F.Supp. 293 (M.D. Tenn. 1955). See generally 89 C.J.S. Trusts §§ 139, 155 (1955); Bogert, Trusts and Trustees, § 472 (1935, 1946).

The appellant states that it is clear beyond dispute that a constructive trust existed (Appellant's Opening Brief, p. 12). The appellant does not and could not rely upon a decree establishing a constructive trust because no decree was entered by the District Court or Referee. Instead, the appellant apparently contends that a constructive trust exists by implication because it contends that the master's report can lead to only one conclusion: that the Mayer Development Company held the vendee's interest in the Ann Clark property as a constructive trustee for the debtor (Appellant's Opening Brief, p. 12-13). In support of this assertion, the appellant quotes at length from two treatises on the law of trusts (Appellant's Opening Brief, p. 12). Those authorities do not suggest that a constructive trust is the exclusive remedy by which one may obtain an interest in property

under the circumstances presented in the instant case. Nor do they suggest that a constructive trust may be established by implication without a court decree. Instead, they suggest a contrary conclusion: A court decree is essential to the establishment of a constructive trust.

It is well established that bankruptcy proceedings are equitable in nature and are to be administered in accordance with general principles of equity. See generally, 1 Collier, Bankruptcy, ¶ 2.09 (14th ed. 1967). See also 11 U.S.C. §§ 46, 501.

The master's report did not establish a constructive trust. Instead, the master simply proposed an exercise of the inherent equitable power of the Bankruptcy Court by proposing an order requiring the Mayer Development Company to convey its interest in the Ann Clark property to the Trustee. The record does not disclose that the Mayer Development Company executed the vendee's deed pursuant to an order of the Court.[9] However, even if it did so, that order would merely be an exercise of the inherent equitable powers of the Bankruptcy Court.

The appellant's reliance upon the master's findings and conclusions is not well founded for another reason. The master's report is merely advisory and must be confirmed by the District Court to be effective. *In Re Mifflin Chemical Corporation,* 123 F.2d 311 (3rd Cir. 1941) cert. denied 315 U.S. 815 (1942); *Gleeson v. Karr,* 219 F.2d 64 (9th Cir.

9. The appellant states that the Referee "ordered the Mayer Development Company, a partnership, to execute a deed and assignment of their buyer's interest to the debtor corporation. This 'turn over' order was not resisted by the Mayer Development Company and was shortly thereafter complied with" (Appellant's Opening Brief, p. 25). This statement is not unsupported by the record. The master proposed an order (R. 37). Subsequently, the Mayer Development Company executed its vendee's deed in favor of the Trustee. Still later, the District Court approved the Trustee's acquisition of the vendee's interest (R. 284).

1955) cert. den. 350 U.S. 827 (1955); Cf. *Garden City Canning Co. v. Addy,* 116 F.2d 137 (9th Cir. 1940).

If as the appellant contends the master found a constructive trust existed and the debtor's interest related back to 1963, then it is clear that the District Court did not accept his findings or adopt his report since the Court expressly found that the debtor corporation had no interest in the Ann Clark property prior to April 2, 1966.

It is clear that no constructive trust was established, directly or by implication.

C. ASSUMING ARGUENDO THAT A CONSTRUCTIVE TRUST WAS ESTABLISHED, THE DEBTOR CORPORATION DID NOT HAVE AN INTEREST IN THE ANN CLARK PROPERTY WHICH WAS SUBJECT TO APPELLANT'S LIEN.

1. The Imposition of a Constructive Trust Is an Equitable Remedy and It Does Not Create Substantive Rights.

The appellant contends that if the Court found that the Mayer Development Company held the vendee's interest in the Ann Clark property as a constructive trustee for the debtor, then the debtor's interest as vendee relates back to the time when that interest was acquired by the Mayer Development Company. The appellant misunderstands the effect of the imposition of a constructive trust. The imposition of a constructive trust does not create substantive rights. It is merely a procedural device; an equitable remedy.

It is a basic principle of equity jurisdiction that equity acts only in personem and only indirectly to the res. The application of this principle to this case is illustrated by one author's statement:

> The meaning of this principle simply is that a decree of a court of equity, while declaring the equitable estate, interest, or right of the complainant to exist, does not operate by its own intrinsic force to vest the

> complainant with the legal estate, interest, or right to which he is pronounced entitled; such decree is not itself a legal title, nor can it either directly or indirectly transfer the title from the defendant to the complainant (citations omitted).
>
> 27 Am.Jur. 2d, Equity, § 122 at p. 649 (1966).

Even if a constructive trust was established by the District Court, the debtor corporation did not acquire an interest in the Ann Clark property until the vendee's deed was executed on April 2, 1966.

In *Melenky v. Melen,* 233 N.Y. 19, 134 N.E. 822 (1922), the plaintiff's husband conveyed land to his son who orally agreed to reconvey it upon demand. The father subsequently married and asked his son to reconvey the property. The son refused to do so but conveyed an estate for life to his father. The Court held that the plaintiff could not maintain a suit to establish an inchoate right of dower in the land and to compel the son to reconvey it. The Court said that the father might be entitled to enforce a reconveyance on the ground that the son was guilty of an abuse of a confidential relation and therefore was a constructive trustee of the property, yet the father had no such estate in the land as to entitle his wife to dower. The Court held that until the entry of a decree, the defrauded grantor was not the owner of an estate but was the owner of an obligation, a chose in action.

"A constructive trust is not a title to or lien upon property but a mere remedy to which equity resorts in granting relief against fraud; and it does not exist so as to affect the property held by a wrongdoer until it is declared by a court of equity as a means of affording relief." *International Refugee Organization v. Maryland Drydock Co.,* supra, p. 8. "A constructive trust is merely a procedural device . . . it is not a part of the substantive law . . . [and] does not

create in the party favored by it any new substantive rights. Its sole purpose is to enable the Courts to afford the victim of the wrong relief in specie." *Barnes v. Eastern and Western Lumber Company,* 287 P.2d 929, 949 (Ore. 1955) (En Banc).

Cf. *Salisbury v. Tibbetts,* 259 F.2d 59 (10th Cir. 1958) where the Court recognized that a constructive trust is only a fiction imposed as an equitable device to prevent injustice and it does not create any substantive rights.

The controlling authorities set forth above demonstrate that there is no merit to appellant's contention that the debtor corporation's vendee's interest relates back to the date the Mayer Development Company acquired that interest in 1963.

The authorities cited by appellant do not express a contrary view. Instead, they confirm that a constructive trust is merely a procedural device and it does not create substantive rights. The appellant cites *Markel v. Phoenix Title & Trust Co.,* 100 Ariz. 53, 410 P.2d 662 (1966) (In Division) (Appellant's Opening Brief, p. 12) although it is not clear for what proposition that case is cited. In that case, suit was brought to impose a constructive trust on one-half the proceeds realized from a sale of real property. The plaintiff was divorced from her husband in 1939. In the divorce proceedings, the Court entered a judgment which approved and incorporated a property settlement wherein the husband agreed to give his wife a one-half interest in any funds obtained through lease, sale or disposal of certain land located in Arizona. Subsequently, the husband remarried and prior to his death his second wife sold the Arizona land. The plaintiff sought to impose a constructive trust upon one-half of the proceeds realized from the sale of that property. The trial court granted the defendant's motion for judgment.

On appeal, the defendant contended that the judgment of the Kansas court attempted to transfer title to land in Arizona and thus was in violation of a Supreme Court case which prohibited one jurisdiction from directly affecting title to land in another jurisdiction. In commenting upon this contention, the Court said:

> The Kansas Court expressly left title in the name of Earl E. Van-Y and gave plaintiff a "one-half interest in any *funds* * * * obtained through lease or sale" . . . . We believe *MacDonald v. Dexter,* (citation omitted) is quite similar to the case before us. There, a Missouri court *denied* a party an interest in the proceeds of land situated in Illinois . . . . Illinois held that an adjudication as to an interest in *proceeds* in land situated in Illinois was not an adjudication directly as to the title of the land itself. The Court explained its holding as follows:
>
> "* * * This contract obviously was not intended to give appellant any right to have a portion of the land in question conveyed to him or to give him any interest of any kind in the land itself, but only an interest in the net profits that might arise from its sale." (Emphasis Added)
>
> 100 Ariz. 53, 56; 410 P.2d 662, 664

Since the Court expressly found that an interest in real property was not in issue, that case does not support appellant's contention that the debtor's vendee's interest relates back.

Similarly, *Linder v. Lewis, Roca, Scoville & Beauchamp,* 85 Ariz. 118, 333 P.2d 286 (1958) (Appellant's Opening Brief, p. 12) is not relevant to the instant case. That case arose from a garnishment where the garnishor alleged a fraudulent conveyance and others intervened asserting an attorneys' lien. The Court held that an attorney has a charging lien against funds received in payment of a judg-

ment obtained through his services and a judgment creditor could not assign the judgment claim and its assignee was to be considered as holding those funds to the attorneys' use and benefit. *Smith v. Connor,* 87 Ariz. 6, 347 P.2d. 370 (1959) (Appellant's Opening Brief, p. 12) does not support appellant's contention. In that case, the Court expressly recognized that a constructive trust is a legal fiction.

The appellant places great emphasis upon the master's report. That report does not support the appellant's contention. The master did not propose that an order be entered vesting the vendee's interest in the debtor. Instead, he proposed an order be entered directing the Mayer Development Company to convey the vendee's interest to the debtor. Until that conveyance was made on April 2, 1966, the debtor had no interest in the Ann Clark property to which the appellant's lien could attach.

2. A Vendee's Interest Is Not Subject to a Materialman's Lien.

Even assuming arguendo that the debtor had a vendee's interest at the time appellant performed its work, the appellant is not entitled to its lien because a vendee's interest in real property is not subject to a materialman's lien.

Although there is admittedly a division of authority, the better reasoned view is that a vendee's interest in real property is not subject to a materialman's lien. In *Callejo-Borges v. Rochelle,* 316 F.2d. 812 (5th Cir. 1963) a bankrupt was in possession of certain property under the terms of a contract or option to purchase. The trustee contended that the contract to purchase was valid while the owner of the land contended that the bankrupt's option had expired before bankruptcy. While this controversy was pending, the parties reached a settlement under the terms of which the owner paid the trustee a cash settlement. This settlement

was approved by the bankruptcy court and the trustee was authorized and did execute a quit claim of the property to the owner. The appellant undertook to impress a mechanic's lien upon the property. He had entered into a written contract with the bankrupt for the performance of certain professional services in connection with improvements to be constructed upon the bankrupt's properties. He contended that at the time of bankruptcy the bankrupt owned an interest of value in the property and that his lien affixed to that interest. He further asserted that his claim should be classified as a secured claim against the funds received from the owner of the property. The referee held that the claim was not secured "because the bankrupt did not have an interest in the property of such a nature as to permit a mechanic's lien to attach . . . ." On appeal, the Court held that this ruling was correct:

> Article 5452 of Vernon's Civil Statutes of Texas affords a lien to one who furnishes labor or material by virtue of a contract "with the owner or owners * * *" of the property in question. In an early case the Supreme Court of Texas held that one in possession of property, under a contract to purchase (who thereafter defaulted, so that the sale was not consummated) was not an "owner" who might fix a lien thereon.
>
> 316 F.2d. 812, 813

Similarly, in *Bledsoe v. Colbert,* 120 S.W.2d 909 (Ct. Civ. App. Tex. 1938), the plaintiff sought to foreclose a laborer's lien for labor performed for a vendee in possession under a contract of sale. On appeal, the Court held that the trial court properly granted judgment for the defendants:

> Under these facts, was Colbert [the vendee], as a matter of law, the owner of the lot? We think not. Even if the deed, found to have been placed in escrow and never delivered, had been delivered and had taken

> effect according to its terms, the legal title would have remained in Marrow and Upshaw [the vendors], and only an equitable title would have thereby vested in Colbert. The former would have had the right, upon default in payment of any of the installments of the purchase price, to rescind the conveyance, thereby extinguishing any equitable title to Colbert. Such right would be defeated if Colbert could have burdened the property with a lien claimed. This question, we think, must be regarded as having been settled by the Supreme Court in *Galveston Exhibition Ass'n v. Perkins,* 80 Tex. 62, 15 S.W. 663 (citations omitted).
>
> 120 S.W.2d. 909, 910

In *Holland v. Farrier,* 130 N.E. 823 (Ind. App. C.T. (1920) the Court said:

> A person in possession of real estate under a contract of purchase cannot defeat or cloud the vendor's title by suffering a mechanic's lien to be filed against such real estate for improvement made thereon by him.
>
> 130 N.E. 823, 825

The *Farrier* case was cited and quoted with approval in *Harris v. Mt. Vernon Lumber Co.,* 173 N.E.2d. 672 (Ind. App. Ct. 1961).

None of the cases relied upon by appellant hold that a vendee's interest in real property is subject to a materialman's lien. Therefore, they are simply not relevant.

The appellant does not contend that the debtor was an agent for the owner, Ann Clark, in contracting with the appellant for the work allegedly performed by it. Nor would the record support such contention. Cf. *Mulcahy Lumber Co. v. Ohland,* 44 Ariz. 301, 36 P.2d. 579 (1934)

Therefore, there was no interest in the Ann Clark property to which appellant's lien could attach.

II. The District Court Properly Held That the Ann Clark Property Was Not Subject to Any Liens or Encumbrances Because Appellant Failed to Perfect Its Lien and Failed to Prove That It Had Provided the Labor and Materials Upon Which Its Claim of Lien Was Based.

A. APPELLANT DID NOT SUBSTANTIALLY COMPLY WITH THE STATUTORY REQUIREMENTS TO PERFECT ITS LIEN.

1. The Appellant's Notice and Claim of Lien Did Not Contain the Names of the Owners as Required by Statute.

Section 33-993 A.R.S. which prescribes the procedure necessary to perfect a materialman's lien in Arizona provides as follows:

> In order to impress and secure the lien provided for in this article, every original contractor, within ninety days, and every other person claiming the benefits of this article, within sixty days after the completion of a building, structure or improvement, or any alteration or repair thereof, shall make duplicate copies of a notice and claim of lien and file one copy with the county recorder of the county in which the property or some part thereof is located, and within a reasonable time thereafter serve the remaining copy upon the owner of the building, structure or improvement, if he can be found within the county. *The notice and claim of lien* shall be made under oath by the claimant or some one with knowledge of the facts, and *shall contain*:
>
> 1. A description of the lands and improvements to be charged with a lien, sufficient for identification.
>
> 2. *The name of the owner or reputed owner of the property concerned,* if known, and the name of the person by whom the lienor was employed or to whom he furnished materials.
>
> 3. A statement of the terms, time given and conditions of the contract, if it is oral, or *a copy of the contract, if written.*
>
> 4. A statement of the lienor's demand, after deducting just credits and offsets.
>
> (emphasis added)

The appellant asserts that there has been substantial compliance with the requirements of Section 33-993 (Appellant's Opening Brief, p. 19). It states that "the names of the owners and reputed owners are also clearly set forth. . . ." (Appellant's Opening Brief, p. 19). It is difficult to understand how appellant can make this statement when the face of the notice and claim of lien clearly shows that neither Ann Clark nor the Mayer Development Company, a partnership, were named.[10]

It is well settled in Arizona that there has not been substantial compliance with the procedures to perfect a materialman's lien when the owner or reputed owners of the property concerned are not named in the notice and claim of lien. *American Coarse Gold Corporation v. Young,* 46 Ariz. 511, 52 P.2d 1181 (1935). See also *Irwin v. Murphey,* 81 Ariz. 148, 302 P.2d. 534 (1956) where the court said the statute relating to materialmen's liens must be strictly followed to perfect the lien. In *Peterman-Donneley Eng. & Con. Corp. v. First Nat. Bank,* 2 Ariz. App. 321, 408 P.2d. 841 (Ct. App. 1965), the Court said:

> The purpose of the requirements of A.R.S. 33-993 is to give the property owners an opportunity to protect themselves and time to investigate the claim and determine whether it is a proper charge and lien.
> 2 Ariz. App. 321, 323, 408 P.2d. 841, 843.

Obviously, if this purpose is to be satisfied, then the property owner must be named in the notice and claim of lien and served with a copy. If the owner is not named and

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10. The caption as it appeared in the appellant's Notice and Claim of Lien is set forth in Appendix B. The appellant refers to its notice and claim of lien as "Appellant's Exhibit No. 1" in its Opening Brief. It was admitted as part of Appellant's Exhibit AA-2 at the October 9th hearing (T. 10).

served then the purpose of the statute is frustrated and there has not been substantial compliance with the statute.

Ann Clark and the Mayer Development Company were the vendor and vendee, respectively, of the Ann Clark property at the date of appellant's notice and claim of lien. Appellant does not dispute this. Although the appellant attempted to prove the validity of its lien, the record does not show that Ann Louise Clark and the Mayer Development Company were served with a notice and claim of lien. Obviously, if they were not named in the notice the reasonable conclusion is that they were not served. The appellant does not state that Ann Clark and Mayer Development Company were served with a copy of the notice. We believe that appellant's reasons for omitting such a statement are obvious. The record is totally devoid of any proof that such service was made. It was incumbent for appellant to prove that copies of its notice were served. *Love Lumber Co. v. Reaser,* 212 N.E.2d. 655 (Ohio 1964.)

In *Leeson v. Bartol,* 55 Ariz. 160, 99 P.2d. 485 (1940) (Appellant's Opening Brief, p. 20), a claimant filed its notice and claim of lien with the county recorder and within a reasonable time thereafter served the owners of the improvement with an exact copy of the notice. The statute required the claimant to serve a duplicate copy of its notice upon the owner of the building or improvement. The owner contended that since the notice was not made in duplicate this defeated the validity of the lien. The Court rejected this contention and held that service of an ordinary copy of the original notice would be sufficient compliance under the statute.

In the instant case, we do not contend that appellant's lien is invalid because an ordinary copy rather than a duplicate original copy of the notice was served upon the owners or reputed owners. Rather, we contend that the appellant's lien was not validly perfected because the appellant failed to serve a copy of the notice, ordinary or duplicate original, upon the owners Ann Clark and Mayer Development Company. In *Leeson,* supra, the Court did not suggest that a lien claimant substantially complies with the requirements for perfecting its lien when it fails to serve a copy of its notice upon the owners or reputed owners. Instead, the Court's comments clearly suggest that such service is essential to satisfy the requirements of Section 33-993. In the absence of such service there cannot be substantial compliance with the statute.

Similarly, the appellant's reliance upon *Peterman-Donnelly Eng. & Con. Corp. v. First Nat. Bank,* supra, p. 18 is not well founded. In that case, the owner contended that a contractor had failed to perfect its lien because a copy of the notice was not served on it. Service of the notice was made upon the law partner of the statutory agent of the owner and subsequently the statutory agent executed a formal acknowledgement of service. The Court rejected the contention that service had not been made and held that service was made in strict compliance with the statute. In the instant case, service of the notice was not made upon the owner directly or indirectly by service upon its statutory agent. Accordingly, the *Peterman* case does not support appellant's contention that there was substantial compliance with the statutory requirements for perfection of its lien.

To prove the validity of its lien, appellant was required to prove that it had complied with the essential require-

ments of the statute. It did not do so. Accordingly, the District Court properly held that the Ann Clark property was not subject to appellant's lien.

2. The Appellant's Notice and Claim of Lien Did Not Contain a Copy of the Written Contract or Sufficient Statement of Its Terms and Conditions.

Section 33-993 A.R.S. requires a lien claimant to include in its notice and claim of lien a "statement of the terms, time given and conditions of the contract, if it is oral, or a copy of the contract, if written." A strict reading of this provision would require that the appellant attach a copy of its contract to its notice. The record does not disclose that such a copy was attached to the notice and apparently appellant concedes that this was not done. Instead, the appellant cites and quotes at length from several cases which we presume appellant relies upon in excusing its failure to attach a copy of the contract.

Before discussing the authorities relied upon by appellant, it would be desirable to set forth in full those portions of appellant's notice which it could rely upon in contending that there has been substantial compliance with the statute. Appellant's notice provided in pertinent part:

> 2. Claimant has performed labor and furnished materials in the alteration, construction and erection of various signs, flagpoles, etc. in and upon those certain buildings now upon that real property [followed by a description of the real property].
>
> . . . .
>
> 6. That said labor and materials furnished by claimant were furnished pursuant to oral and written contracts and instructions and invoices dated from September 24, 1964 through and including June 28, 1965, entered into with Mayer Central Building Cor-

> poration, acting for itself as owner. Copies of the various invoices and charges are attached hereto and by reference thereto made a part hereof. The total amount due is $21,493.28.

Although the notice stated that the invoices were attached, apparently no invoices were attached. Instead, what the appellant terms a "Summary Invoice" is attached. That summary invoice merely lists a series of dates, what appear to be invoice numbers, and the amount of charges for each such invoice. Since the appellant refers only to this "Summary Invoice" and does not refer to any copies of invoices, we must conclude that copies of the invoices were not attached to the notice despite its statement to that effect (Appellant's Opening Brief, p. 22).

The appellant cites and quotes from *Lanier v. Lovett,* 25 Ariz. 54, 213 Pac. 391 (1923), although it is not clear for what proposition that case is cited. If the appellant cites that case for the proposition that a materialman may perfect a lien under Section 33-993 by substantially complying with the requirements of that statute, we concede that is correct. If, however, the appellant relies upon that case to show that it has substantially complied with the requirements of Section 33-993, then we do not agree. In *Lanier,* a suit was brought to establish and foreclose a mechanic's lien. Unlike the instant case, the owner or reputed owner was apparently named in and served with the notice. The claimant's notice expressly stated that the claimant entered into a contract for the furnishing of labor and material and for the installation of plumbing which contract was oral and that the materials furnished and labor performed thereon was to be paid upon the completion of the building in which the plumbing was to be installed. The defendant contended that the contract set out in the notice did not meet the re-

quirements of the statute because it did not state what labor was to be performed or material furnished and because it did not itemize the material and labor. The Court observed that the omission in the notice to itemize the different articles that went into the job and the days of labor consumed in placing them could be excused on the theory that under the contract they were not to be paid for as furnished or rendered but as a whole. The Court said that the statement of terms, time given and conditions of the contract as contained in the notice to the effect that the plaintiff was to install all plumbing and furnish all material for a lump sum to be paid on the completion of his contract was sufficient compliance with the law. It should be noted that an oral agreement was involved in the *Lanier* case while in the instant case the appellant relied at least in part upon written contracts. The statute clearly requires that a copy of the written contract be attached in a notice and claim of lien. Obviously, there was no need to consider that requirement in *Lanier* since a written contract was not involved. To that extent, appellant can not rely upon *Lanier* to excuse its failure to attach a copy of its written contract. Furthermore, in its notice the appellant merely stated that it had performed labor and furnished materials in the alteration, construction and erection of various signs, flagpoles, etc. and that the labor and materials furnished were furnished pursuant to oral and written contracts and instructions. The appellant stated that the contract had been performed pursuant to its terms but it made no attempt to describe even in general terms the terms and conditions of the contract as did the claimant in the *Lanier* case. Accordingly, that case does not support the contention that appellant substantially complied with the statute.

In *Peterman-Donnelly Eng. & Con. Corp. v. First Nat. Bank,* supra, p. 18 the owner contended that the contractor

had failed to perfect its lien because its notice and claim of lien did not contain a copy of the written contract. The pertinent portions of the notice provided:

> 3. * * * that on September 18, 1961 the Peterman-Donnelly Engineers & Contractors Corporation entered into a contract with The Lost Dutchman Baseball Association, Inc. which, together with change orders thereafter agreed upon, was for the construction of fences, batter's eye, bleachers, ramps, box seats, dugouts, dugout tunnel, backstop, press box and other miscellaneous improvements.
>
> 4. * * * that the original contract was for a price of $19,800.00; in addition thereto, by change orders and additions agreed to by the parties, $12,545.38 in other work has been performed.

In considering whether this notice was in substantial compliance with the statutory requirement that a copy of the contract be attached to the notice, the Court observed:

> Obviously the quoted portions of the notice do not strictly satisfy the statutory requirement of a "* * * copy of the contract, * * *" but it is equally evident that the principal terms of the agreement have been incorporated into the notice: the parties, the date, the purpose and the consideration. In addition, elements of subsequent oral agreements are included. What is lacking is a recital of the fine print terms of a standard form contract.

When the appellant's notice and claim of lien is tested by the criteria set forth above it seems clear that the appellant did not substantially comply with the statute. The principal terms of the agreement have not been incorporated into its notice: the date, the purpose and the consideration have not been set forth. The appellant's notice simply states "that said labor and materials fur-

nished by claimant were furnished pursuant to oral and written contracts and instructions. . . ."

In *Ranch House Supply Corp. v. Van Slyke,* 91 Ariz. 177, 370 P.2d 661 (1962) (In Division) (Appellant's Opening Brief, p. 23), the question was whether the plaintiff was a "materialman" within the meaning of the Arizona materialman's lien statute. That case did not involve the question whether a notice and claim of lien was in substantial compliance with statutory requirements for perfection. Accordingly, it is simply not relevant to the issues presented here.

In *Pioneer Plumbing Supply Co. v. Southwest Saving and Loan Ass'n,* 3 Ariz. App. 495, 415 P.2d 893 (Ct. App. 1966), vacated, 102 Ariz. 258, 428 P.2d 115 (1967) (En Banc) (Appellant's Opening Brief, p. 23), the question was whether a subcontractor and his supplier could assert an equitable lien against undisbursed construction loan funds and whether the equitable lien would be entitled to priority over the rights of a mortgagee. The Supreme Court's comments clearly show that there was no issue as to the substantial compliance with the statutory requirements for perfection of a materialman's lien and accordingly that case can hardly be considered determinative of the issues presented here. The Supreme Court recognized that there were limitations to protecting the rights of materialmen:

> Pioneer and Rural contend that it is the policy of Arizona to protect the rights of those who furnish labor and materials to improve property. With this principal we agree; however, those rights must be established under existing law.
>
> 102 Ariz. 258, 428 P.2d 115.

The appellant seeks to excuse its failure to substantially comply with the statutory requirement for perfecting its

lien by relying upon the general policy to protect materialmen's liens. However, the Supreme Court has recognized that this policy is not without limitation and although a materialman will not be required to strictly comply with the statutory requirements for perfecting a lien, he must substantially comply with those requirements. This the appellant did not do.

B. Appellant Did Not Prove That It Furnished the Labor and Materials Upon Which Its Claim of Lien Was Based.

Section 33-981 A.R.S. provides:

> A. Every person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.
>
> B. Every contractor, sub-contractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement, is the agent of the owner for the purpose of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent.

To entitle a claimant to recover upon its claim of lien, it is not sufficient to merely comply with the procedures to perfect that lien as set forth in Section 33-993 A.R.S. The claimant has the burden of establishing his right to a lien. *Holmes Oil Co. v. Rule,* 70 P.2d 86 (Okla. 1937); *Westinghouse Electric Supply Co. v. Hawthorne,* 150 P.2d 55 (Wash. 1944). The appellant has the burden of showing that it furnished the labor and materials for which it claimed a lien.

The basis of appellant's claim was that it furnished and installed signs. Yet, Mr. Magruder, appellant's vice-president and general manager, did not know how many signs it placed on the Ann Clark property,[11] or when the signs were placed on the property.[12] He could not testify as to

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11. Q. (by Mr. Steiner) Sir, to make absolutely clear to the extent of your knowledge, first, do you know how many signs were placed on the Ann Clark property?

A. (by Mr. Magruder) No. If I may go ahead, I mean during the construction period there, no.

Q. Your answer is no?

A. "No."

Q. Secondly, what was the nature of the signs that were placed on the Ann Clark property?

A. They were directional signs and parking signs.

Q. A directional sign is one-way sign, or—

A. Right. During the construction period they were there for the purpose of getting in an area, because the parking lot was in quite a mess there, and they had certain areas of it open one time or the other, and they used this to direct them in and out.

Q. Did I understand your previous testimony that you thought there were three or four of such signs, or did you say you didn't know.

A. I didn't know. I don't know. (T. 69)

12. Q. (by Mr. Steiner) Very well. Now, do you know exactly when any one sign was placed on the Ann Clark property?

A. (by Mr. Magruder) Not specific dates. It was during the construction period.

One time was when they had part of the other driveways tied up.

Q. Now, you say during the construction period. What dates are we speaking of? Was it 1965, 1964?

A. Well, I haven't thought of this thing in specific dates, even specific years, because I was measuring our discussions, how long this thing has been drug out, but it was during the time they were constructing. I couldn't pin it down.

Q. Would you accept the year 1964 as being the year of construction, or do you know?

A. Frankly, no. I know that it was during the time construction was going on.

Q. So you don't even know what year it was going on?

A. No.

Frankly, I think that I should—construction period is all. Time seems to slip away. (T. 70-71)

Q. (by Mr. Pogson) Do you know when during the construction it was that the signs on the Ann Clark were put on the Ann Clark property?

A. Not specifically, no. (T. 68)

their value.[13] The signs were not on the Ann Clark property at the time appellant attempted to prove its lien.[14] He couldn't even state that the signs were on the property when

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13. Q. (by Mr. Steiner) How much does a directional sign cost? How much was your charge for one directional sign, for Mayer Central?

A. (by Mr. Magruder) Well, there is quite a variation of types of signs, depending on the current problem, the construction, and so forth, as to how big or how small it could be made.

Q. Do you know as to the Ann Clark property signs which kind of directional and parking signs were used?

A. I know part of them. I believe there was one large directional sign, and the others were of a smaller nature.

Q. Very well. How much does one large directional sign cost, or how much did such a sign cost?

A. I don't know exactly what theirs cost.

I can give you an approximate cost of directional signs. I can't be specific.

Q. To the best of your knowledge, of what your company charged the debtor for one large directional sign?

A. I don't have those figures available. I don't know exactly. (T. 69-70)

Q. (by Mr. Pogson) What was your price? The price at which you sold these signs to the Mayers.

A. (by Mr. Magruder) You mean the entire—

Q. I am just talking about the signs that were on the Ann Clark property at one time.

A. I don't have those figures.

Q. Would you have any approximation?

MR. WOLFE: I am going to object to any approximations or speculations by the witness. He has answered that he doesn't know. (T. 66-67)

14. THE COURT: I mean, are they there now?

MR. MAGRUDER: No, they are not there now.

MR. WOLFE: They have been moved off the property?

A. (by Mr. Magruder) Yes, the last time I viewed the property —some of them have been shuffled around on the property. The last particular time I viewed the lot they were not there. (T. 15)

Q. (by Mr. Ducey) There are no signs on that property at this time?

A. At the last time I looked at it, of course they shuffle those around out there quite a bit, but the last time I looked at it, I didn't see any. (T. 20)

Q. They are not there at this time, are they?

A. Not the last time I looked at it, which was a week or two ago. (T. 21)

appellant filed its notice and claim of lien.[15] To be entitled to a lien, appellant was required to show that the signs it allegedly furnished for the Ann Clark property were of a permanent nature. *Westinghouse Electric Supply Co. v. Hawthorne,* supra, p. 26. Appellant's witness was unable to state with any degree of certainty how many or which signs were permanent.[16] He admitted that at least some, and probable all, the signs were temporary.[17]

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15. Q. (by Mr. Pogson) Do you know whether those signs were still on the Ann Clark property in the Summer of 1965, which would be right after your company finished doing the last part of its work.
A. (by Mr. Magruder) If they were on the last part of 1965?
Q. Or the Summer of 1965.
A. I couldn't say specifically. (T. 68)

16. None of the signs remained on the Ann Clark property at the time appellant attempted to prove its lien and possibly when appellant filed its Notice and Claim of Lien. See n. 14, 15 supra. The logical conclusion is that none of appellant's signs were permanent.

17. Q. (by Mr. Wolfe) Now, what kind of signs were they, as best you can remember?
A. (by Mr. Magruder) Well, we did a lot of small signs in addition to the big work down there. I can't remember exactly what it was, because during construction and entrance, and first getting their parking controlled there, there were small parking type signs.
Q. What kind of signs?
A. Small parking and directional type signs.
THE COURT: You mean temporary?
THE WITNESS: They could be temporary or permanent. (T. 15)
Q. (by Mr. Steiner) Are these signs movable signs?
A. They can be of this nature. In other words, some of them are planted in the ground, and some of them are of a portable nature. Of course any sign can be moved or relocated down there, the big signs, one of the big signs down there. They could be relocated.
Q. Do you recall how any sign was in fact attached to the Ann Clark property?
A. How any sign?
Q. Any one?
A. Some of them were set in the ground, and some were of a portable nature, portable stands. (T. 71-72)
Q. (by Mr. Pogson) Were they temporary signs for use during construction?

The record clearly shows that the appellant wholly failed to establish by competent evidence that it was entitled to its lien.

III. The District Court Properly Relieved the Trustee from the Stipulation and the Court's Order Based Upon That Stipulation Pursuant to Rule 60(b), Federal Rules of Civil Procedure on the Grounds of Mistake, Inadvertence and Excusable Neglect on the Part of the Trustee.

A. INTRODUCTION.

The appellant effected a partial settlement of its claim with the Valley National Bank and on February 2, 1966, it executed a partial release of its Claim of Lien (R. 271-274). At that time, the Trustee was asked to stipulate to the existence and validity of the appellant's lien for the balance due the work it performed on the North property (R. 257).

On February 10, 1967, the appellant and the Trustee entered into a stipulation which in substance provided that the parties thereto agreed that the appellant had a valid materialman's lien against certain real property which was set forth in full by legal description in the text of the stipulation.[18] On February 20, 1967, the District Court entered its order approving the stipulation. The Court's order was in all material respects identical to the stipulation except that the legal description of the real property was incorporated

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A. They could be left permanently, or they could be considered —I mean, small, they could be taken out and replaced, or relocated on the property.

Q. Were they in fact relocated?

A. Yes. In fact, to this date, the last time I looked at the lot, they had been shuffled around.

Q. And they are not any longer on the Ann Clark property?

A. Not the last time that I saw the property, which is a week or two prior to this hearing, or the last hearing. (T. 66)

18. The real property as described in the Stipulation is set forth in Appendix B and at R. 194-195.

in the order by reference to the stipulation (R. 196-198). The stipulation was prepared by counsel for appellant on his legal stationery (R. 194-198) and presented to the Trustee through counsel (R. 257). The Trustee and his counsel understood that the stipulation was presented to it under the assumption that the existence and validity of the appellant's lien was to be stipulated to as to the North property only. The Trustee and his counsel signed the stipulation under the same assumption. When the Trustee discovered that the Ann Clark property had been included in the stipulation and in the Court's order, he filed a motion to correct the stipulation and Court's order by deleting the Ann Clark property from the real property subject to that order.[19]

The Trustee and his counsel signed the stipulation as prepared because they had failed to check the legal descriptions. Had they done so, they would have discovered that the Ann Clark property was included and they would have deleted the Ann Clark property from the stipulation before signing it (R. 258, 262, 263). See also T. 2. The appellant did not dispute the Trustee's and counsel's statement that they did not intend or know that the Ann Clark property was to be included in the stipulation.[20] Instead, the appellant's counsel stated that the Trustee and his counsel probably overlooked the inclusion of the Ann Clark property in

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19. The legal description of the Ann Clark property is "Lot One (1), Block One (1), CATALINA PLACE. . . ." The legal description of the North property is "Lots Two (2) through Eighteen (18), inclusive, Block One (1), CATALINA PLACE. . . ." The Court viewed the debtor's property as constituting three distinct parcels: the "North" property, the "South" property, and the "Ann Clark" property (R. 283-284).

20. THE COURT: You don't seriously contend that Mr. Duecy and Mr. Fulford, through him, are just making this up.
MR. WOLFE: No, no. (T. 22-23)

the legal description set forth in the stipulation.[21] The Court recognized that the Chapter X proceedings involved such an enormous amount of detail that the inadvertence of the Trustee and his counsel was certainly understandable (T. 5).

B. THE DISTRICT COURT PROPERLY RELIEVED THE TRUSTEE OF THE STIPULATION WHICH HE HAD ENTERED INTO AS A RESULT OF MISTAKE, INADVERTENCE, OR EXCUSABLE NEGLECT.

A court may relieve a party of its stipulation where the stipulation was entered into by mistake or through inadvertence or excusable neglect. In *United States v. City of Tacoma, Washington,* 330 F.2d 153 (9th Cir. 1964), this Court said that a party would be entitled to be relieved of its stipulation as to compensation for condemned land, where the stipulation was entered into under a misunderstanding as to the interest being taken. It is within the discretion of a court to disregard a stipulation entered into through inadvertence or mistake of fact. *Albee Homes, Inc. v. Lutman,* 274 F.Supp. 875 (E.D. Pa. 1965). In that case, former employers sought to recover amounts allegedly overdrawn or borrowed by a former employee. The defendant employee had stipulated that a long series of checks were properly chargeable to him. Counsel later discovered that two checks had been inadvertently included in the stipulation and the Court permitted the defendant to withdraw them from the stipulation. *Johnstone v. Bettencourt,* 16 Cal. Rptr. 6 (Dist. Ct. App. 1961). Cf. *Miller v. Schafer,* 102 Ariz. 457, 432 P.2d 585 (1967) (In Division) where the

21. MR. WOLFE: Oh no, no. I didn't understand you. I thought you meant that they were lying. Of course I don't think they are lying.

THE COURT: I was sure you didn't.

MR. WOLFE: He probably overlooked it. I don't know what is in their minds.

Court disapproved penalizing an attorney by refusing to grant relief from a stipulation entered into through inadvertence.

The Trustee did not intend or understand that the Ann Clark property was included in the stipulation. His failure to discover that it was included was understandable in view of the close similarity in legal description between that property and the North property.[22] Appellant's counsel did not dispute that the Trustee had signed the stipulation by mistake or inadvertence. Indeed, he conceded that a mistake had been made. The District Court considered the Trustee's mistake to be excusable neglect in view of the enormous detail work involved in the reorganization proceedings. The controlling authorities set forth above make it clear that the District Court properly relieved the Trustee from the stipulation.

The authorities relied upon by the appellant are not determinative of the issues presented. In *Evans v. Raper,* 93 P.2d 754 (Okla. 1939) (Appellant's Opening Brief, p. 26) the plaintiff filed a motion to vacate and set aside a stipulation based upon allegations of fraud in its procurement. On appeal, the Court affirmed the trial court's holding that there was no evidence of fraud on the part of the defendants in the negotiation of the compromise settlement and procurement of the stipulation. That case is simply not relevant to the issues presented here. It did not involve mistake or inadvertence as in the instant case. Nor did the Court suggest that upon a showing of fraud, the stipulation would not have been set aside.

Similarly, *In re Brandt's Estate,* 67 Ariz. 42, 190 P.2d 497 (1948) (Appellant's Opening Brief, p. 26) is not rele-

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22. See n. 19, supra, where the legal descriptions of the Ann Clark property and the North property are set forth.

vant to the instant case. In that case, the appellee, who was the second wife of the decedent, petitioned the Court for a family allowance. The appellant, the decedent's executrix, filed a response to the petition wherein she attacked the validity of the marriage between the decedent and appellee on the ground that the decedent's previous divorce was void. Prior to the hearing on the appellee's petition, the parties stipulated that the Court should consider the right of the executrix to attack collaterally the validity of the divorce decree. The appellant contended that this stipulation amounted to an agreement that the only issue to be determined was whether the Court had jurisdiction to consider the validity of the divorce decree and the stipulation excluded all other issues including estoppel. The Court observed that the jurisdictional matter was only a preliminary legal question the parties intended to present under the stipulation for determination. The Court held that under its construction of the stipulation the defense of estoppel was not waived. That case involved the construction to be placed upon a stipulation. It did not involve a request to be relieved from a stipulation because of mistake and inadvertence and it is not relevant to the instant case.

C. THE DISTRICT COURT PROPERLY RELIEVED THE TRUSTEE FROM ITS ORDER PURSUANT TO RULE 60(b) FEDERAL RULES OF CIVIL PROCEDURE.

Rule 60(b) F.R.C.P. provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, suprise, or excusable neglect . . . . The motion shall be made within a reasonable time, and . . . . not more than one year after the judgment, order, or proceeding was entered or taken.

A motion to vacate a judgment pursuant to Rule 60(b) F.R.C.P. is addressed to the sound legal discretion of the trial court and the court's determination will not be disturbed except for an abuse of discretion. *Siberell v. United States,* 268 F.2d 61 (9th Cir. 1959). In the instant case, the Trustee made a sufficient showing of excusable neglect or inadventence which the Court found to be understandable in view of the enormous detail and complexity of the proceedings over which it had presided. See *United States v. Gould,* 301 F.2d 353 (5th Cir. 1962) where the Court of Appeals reversed the order of the District Court dismissing the Government's motion to vacate a judgment entered into by stipulation of the parties setting the amount to be paid for land taken in a condemnation action. In that case, the Government had stipulated as to the amount to be paid without further proof or litigation on the mistaken assumption that clear title was in the condemnee. It later appeared that all the land involved was subject to easements as public streets and the condemnee could not be entitled to more than nominal damages. See also *Griffin v. Kennedy,* 344 F.2d 198 (DC Cir. 1965) where the court held that the plaintiffs were entitled to relief under Rule 60(b) on ground of mistake where plaintiffs' counsel erred in admitting that plaintiffs "resided" in enemy territory throughout the war so that they were "enemies" under the Trading With the Enemy Act.

The authorities relied upon by the appellant are not determinative of the propriety of the District Court's vacation of its order. In *Federal Enterprises v. Frank Albritton Motors,* 16 F.R.D. 109 (D.C. Mo. 1954) (Appellant's Opening Brief, p. 29), the movant made no real attempt to show mistake. In the instant case, the Trustee satisfactorily showed that the stipulation was entered into because of

mistake, inadvertence and excusable neglect. Similarly, in *In re Wright,* 247 F.Supp. 648, (D.C. Mo. 1965) (Appellant's Opening Brief, p. 29) the Court held that ignorance of rules of procedure did not constitute excusable neglect. The Trustee did not rely upon ignorance of rules in moving to set aside the stipulation and order. Accordingly, that case is simply not relevant here. In *Frank v. New Amsterdam Cas. Co.,* 27 F.R.D. 258 (D.C. Pa. 1961) (Appellant's Opening Brief, p. 29) the Court held that an attorney's failure to file a timely motion for a new trial was not excusable neglect. That case is obviously not relevant here.

We agree with appellant that a District Court has wide discretion in passing upon a motion under Rule 60(b) and unless it abused its discretion, its ruling will not be disturbed on appeal. *Wojton v. Marks,* 344 F.2d 222, 225 (7th Cir. 1965); *Swam v. United States,* 327 F.2d 431, 433 (7th Cir. 1964) cert. denied 379 U.S. 852 (1964) (Appellant's Opening Brief, p. 29).

There is no merit to the appellant's unsupported assertion that the Trustee offered no proof in support of his claim of mistake or inadvertence (Appellant's Opening Brief, p. 30). The Trustee did offer proof and he did submit affidavits. Furthermore, the previous discussion shows that the Trustee had a meritorious defense to the appellant's lien claim. The appellant has not shown that it actually bargained for the inclusion of the Ann Clark property in the stipulation as part of a compromise settlement. *Hoffman v. Celebrezze,* 277 F. Supp. 482 (E.D. Mo. 1967).

There was ample justification for the District Court's exercise of discretion under Rule 60(b) to modify or set aside its order because of the Trustee's mistake, inadvertence or excusable neglect. Accordingly, there is no merit to

the appellant's contention that the District Court abused its discretion.

D. THE APPELLANT WAIVED ITS RIGHT TO RELY ON THE STIPULATION BY ELECTING TO PROVE ITS LIEN.

During the hearing on the Trustee's motion to set aside the stipulation and order, the appellant moved to admit the testimony and exhibits as part of the Section 197 hearings (R. 275-279). Subsequently, the appellant attempted to prove the validity of its lien against the Ann Clark property through the testimony of Mr. Magruder, its representative. The appellant's conduct was inconsistent with the stipulation and accordingly it waived any right to rely on the stipulation. *Gethsemane Lutheran Church v. Zacho,* 92 N.W.2d 905 (Minn. 1958); *Hamco Oil and Drilling Company v. Ervin,* 354 P.2d 442 (Okla. 1960); *Gorman v. Wilson,* 98 P.2d 608 (Okla. 1940).

CONCLUSION

Appellant's specifications of error are without basis in law or fact and the District Court's decision determining that the Ann Clark property and the proceeds from its sale are not subject to appellant's lien should be sustained.

FENNEMORE, CRAIG, VON AMMON,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT H. CARLYN

(Appendices Follow)

Appendix A

FINDINGS OF FACT

3. On or about April 2, 1966, by vendee's deed, the trustees herein, pursuant to an Order of this Court entered May 9, 1966, acquired the contract interest of Mayer Development Company, a partnership composed of Lawrence D. Mayer and Eric Mayer, in and to the following described property:

> Lot One (1) of Block One (1) CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24, together with the North half of that part of the East-West alley in said Block One lying between the Southerly prolongations of the East and West lines of said Lot One.

Said property will be referred to herein as the "Ann Clark property" since title to said property has at all times relevant to these proceedings rested in Ann Clark subject only to the contract to purchase initially held by the Mayer Development Company and subsequently conveyed as aforesaid to trustee herein by vendee's deed. Prior to April 2, 1966, the debtor corporation had no interest in the Ann Clark property. Such property constitutes the northeast corner of the parking lot to the rear of the Mayer Central Building and at all material times it has been used by tenants of that building for parking purposes. (R. 284)

44. A & A Sign Company, Inc. (hereinafter referred to as "A & A Sign"), an Arizona corporation, had a contractual relationship with the debtor corporation wherein A & A Sign agreed to and did construct certain signs for the debtor corporation on both the North and South property.

Work was performed pursuant to said contract from November 5, 1964, to and including July 2, 1965.

45. A & A Sign recorded a notice and claim of mechanic's lien on September 23, 1965, claiming a lien against both the North and South property and against the Ann Clark property, and attempted to perfect said lien in accordance with A.R.S. § 33-981, et seq.

46. A & A Sign timely filed a pleading in the Superior Court of the State of Arizona in and for the County of Maricopa in Cause No. 179138, wherein it sought to foreclose said lien in accordance with the provisions of A.R.S. § 33-998, and thereafter filed a proof of secured claim in these proceedings. (R. 292)

CONCLUSIONS OF LAW

5. Pursuant to §§ 196 and 197 of the Act of Congress Relating to Bankruptcy, hearings were held at which time evidence concerning the validity, amounts and priority of various secured claims was presented to the Court.

6. All parties in interest had an opportunity to present such evidence as they deemed material to the issues to be decided by the Court. (R. 302)

10. Valid mechanics' and materialmen's liens attach only upon the lot or lots upon which are situated the structures on which the claimant performed labor and/or furnished materials.

13. In order to perfect a valid mechanic's or materialman's lien under a given contract, a direct or original contractor must file or record his notice and claim of lien within ninety (90) days from the last date upon which such contractor performed labor or furnished materials under said contract. (R. 303)

15. The liens of Otis Elevator Company, A & A Sign Company, Bob Campbell Lath-Plaster-Drywall Systems, Inc., and Pioneer Plumbing Supply Company, to the extent valid, attach only to the debtor corporation's interest in the North property, which has heretofore been determined to be valueless. The Court has heretofore determined that all of said claims are junior and subordinate to the claims and interests of Prudential and Fifty Associates.

16. The liens of Otis Elevator Company, A & A Sign Company, Bob Campbell Lath-Plaster-Drywall Systems, Inc., and Pioneer Plumbing Supply Company, even if valid, exceed the value of their security in the amounts claimed, and each such claim should be reclassified as unsecured in its entirety. (R. 304)

32. The trustees herein, on behalf of the debtor corporation, are the owners of the vendee's interest in the Ann Clark property subject to no lien or encumbrance by any party to these proceedings. (R. 306)

Appendix B

A & A SIGN CO., INC., an Arizona corporation,

Claimant,

vs.

MAYER CENTRAL BUILDING CORPORATION, an Arizona corporation; WALTER E. FULFORD, Trustee of the Estate of Mayer Central Building Corporation, an Arizona corporation, debtor; MAYER DEVELOPMENT CORPORATION, an Arizona corporation; LAWRENCE D. MAYER and PAULINE MAYER, his wife; ERIC D. MAYER and FRANCINE MAYER, his wife; FIFTY ASSOCIATES, a Massachusetts corporation; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation; KIRKEBYNATUS CORPORATION OF DELAWARE, a Delaware corporation; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF PHOENIX, a corporation; THE VALLEY NATIONAL BANK OF ARIZONA, a national banking association; THE MASTAN COMPANY, INCORPORATED, a Delaware corporation; ARIZONA REALTY, INC., a New York corporation,

Owners or Reputed Owners,

SOUTHWESTERN GLASS & MILLWORK CO., an Arizona corporation; CONSOLIDATED ROOFING & SUPPLY COMPANY, an Arizona corporation; J. H. WELCH & SON CONTRACTING CO., an Arizona corporation; ORA B. HOPPER & SON, INC., CONSTRUCTION & DEVELOPMENT, an Arizona corporation; GENERAL ELECTRIC SUPPLY COMPANY, a division of General Electric Company, a New York corporation; INDUSTRIAL ELECTRIC, INC., an Arizona corporation; PIONEER PLUMBING SUPPLY CO., an Arizona corporation; TECHNI-BUILDERS, INC., an Arizona corporation; COMMERCIAL DESIGNS, LTD., a Division of Rich-Len Enterprises, Inc., an Arizona corporation; THE O'MALLEY LUMBER COMPANY, an Arizona corporation; W. A. PERRY TILE AND MARBLE CO., an Arizona corporation; THE MARSTON SUPPLY CO., a partnership composed of J. N. Norris, Sr., J. N. Norris, Jr. and Edward Norris; MILTON J. LEVKOWITZ, an individual, dba Sun Wholesale Electric Company; RAY LUMBER CO., an Arizona corporation;

GUY J. QUALTIRE, an individual dba Qualtire Plumbing Co.; KLAAS BROS., INC., PAINTING CONTRACTORS, an Arizona corporation; SHALER GLASS CO., INC., an Arizona corporation; THE ALBERT SECHRIST MANUFACTURING COMPANY, also known as Sechrist Manufacturing Company, a Colorado corporation; EMPLOYMENT SECURITY COMMISSION OF ARIZONA; NUCLEAR CORPORATION of AMERICA-VALLEY SHEET METAL DIVISION, a Delaware corporation; LOUK-MEAD PLUMBING & HEATING CO., an Arizona corporation; DOE CORPORATIONS, JOHN DOE AND JANE DOE, his wife,

Interested Parties.

Appendix C

PARCEL 1

Lots One (1) through Eighteen (18), inclusive, Block 1, Catalina Place, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, Page 24 thereof.

PARCEL 2

All alleys in Block 1, CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24 thereof, lying West of the northerly projection of the east line of Lot Two (2), Block 1, of said CATALINA PLACE.

PARCEL 3

All of Avalon Drive as shown on and dedicated by the plat of CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, Page 24 thereof.

PARCEL 4

Lots One (1) through Sixteen (16), inclusive, Block 2, CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24 thereof.

PARCEL 5

That certain alley lying North of and adjoining the North line of Lot 12 in Block 2, CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24 thereof, and the Westerly prolongation thereof, and lying between the East line of Lot 15 in said Block 2 and the Northerly prolongation of the East line of said Lot 12.

PARCEL 6

That part of the North and South alley adjoining the East line of Lots Fourteen (14) and Fifteen (15), and included between the Westerly prolongation of the North and South lines of Lot Thirteen (13), all in Block Two (2), CATALINA PLACE, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 25 of Maps, page 24.